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## Recent French Legal Developments Concerning a War-Time Arrest and Imprisonment Case

VIVIAN GROSSWALD CURRAN<sup>†</sup>

*Mais qu'est-ce que le savoir? Le savoir, c'est comme l'amour, il faut  
alimenter et nourrir cette lampe ardente de notre connaissance, de  
peur que son contenu même se dessèche, devienne théorique et  
s'inscrive en figures pâles et abstraites sur nos consciences  
vite en repos.*

Jacqueline Mesnil-Amar, *Ceux qui ne dormaient pas*\*

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Some months ago, I gave a talk at the University of Maryland School of Law about the French *Lipietz* case, which had ignited

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<sup>†</sup> Professor of Law, University of Pittsburgh. Unless otherwise noted, translations are mine. My thanks to Professor William Reynolds for his instantaneous contacting of student editors at the *Maryland Journal of International Law* to arrange for the publication of the three documents concerning the *Lipietz* case; to Dean Michael Van Alstine for inviting me to speak at the University of Maryland Law School; to Professor Peter Quint for being a wonderful host and for initiating the series of coincidences that led from Pittsburgh to Baltimore to Toulouse; and to Alisha L. Jacobsen and Juliana Galan for translating the two documents that follow my comments.

\* JACQUELINE MESNIL-AMAR, *CEUX QUI NE DORMAIENT PAS*, JOURNAL, 1944-1946 190 (2d ed. Stock, 2009) (éditions de Minuit, 1957) ("But what is knowledge? Knowledge is like love, an ardent lamp that must be fed and nourished by our learning, for fear that its very contents may dessicate, become theoretical and inscribed in pale and abstract terms in our speedily quiescent consciences.").

passions and passionate debate within France when a lower administrative court ruled for the plaintiffs.<sup>1</sup> The dramatic facts of the case are recounted in the Advisory Opinion to that court, which follows.<sup>2</sup> The facts concern the arrest and imprisonment by “Vichy France,” as the collaborationist 1940–44 war-time government of France is known, of two cousins deemed Jewish pursuant to that regime’s anti-Semitic laws.

In the course of my talk, I mentioned that the Advisory Opinion of the *commissaire du gouvernement*,<sup>3</sup> more or less the equivalent of the European Court of Justice’s Advocate General,<sup>4</sup> had never been published in a French legal periodical or journal. Indeed, it had been rejected for publication, despite the controversy the case and judgment had spawned throughout the country, which ordinarily would have ensured its finding ready placement. By the end of my talk, to my astonishment, my kind hosts had secured an offer from the *Maryland Journal of International Law* to publish the Advisory Opinion, which follows these introductory remarks and on which the lower court’s decision was based.<sup>5</sup>

The Advisory Opinion enters into greater detail than the court decision and refers to numerous cases which, taken together, buttressed the court’s judgment. As the reader may observe, the Advisory Opinion’s analysis of the statutory limitations period covers the *Lipietz* plaintiffs’ claims, but, given that the court decision was

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1. *M. A et consorts Lipietz c/Préfet de la Haute-Garonne et Société nationale des chemins de fer français*, No. 0104248, Tribunaux administratifs de Toulouse [TA] [Administrative Court] June 6, 2006 (Fr.) [hereinafter *Lipietz Decision*], available at <http://helene.lipietz.net/IMG/pdf/jugement.pdf>. An English translation of the decision is available at <http://lipietz.net/spip.php?article1891>.

2. See Conclusions de Jean-Christophe Truillhé, Commissaire du gouvernement, translated in 25 MD. J. INT’L L. 271 (2010) [hereinafter Advisory Opinion].

3. The *commissaires du gouvernement* became known as *rapporteurs publics* on February 1, 2009. See Decree No. 2009-14 of January 7, 2009, Journal Officiel de la République Française [J.O.] [Official Gazette of France], January 8, 2009, p. 479. This change in an institution of French law that had existed since 1831 followed a European Court of Human Rights decision which criticized the French institution as a violation of Article 6 of the European Convention on Human Rights. See *Kress v. France*, 2001–VI Eur. Ct. H.R. 41, available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-in-en>.

4. See Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 AM. J. COMP. L. 363, 374 n.63 (2008).

5. See generally *Lipietz Decision*, *supra* note 1.

rendered in 2006, it also would have cut off future similarly situated plaintiffs within a few months from asserting a cause of action.<sup>6</sup> The plaintiffs had argued several alternative theories with respect to the limitations period. First and foremost, they had urged the court to hold that no statute of limitations applied because the underlying acts were crimes against humanity.<sup>7</sup> Under French law, the crime against humanity is unique in not being subject to a statute of limitations.<sup>8</sup> In losing on this point, the plaintiffs did not subject their own case to defeat, but the innovative legal theory that had permitted them to seek legal recourse for harm, where similarly situated plaintiffs always had failed before,<sup>9</sup> would be of extremely limited benefit to future plaintiffs unless a higher court reinterpreted the limitations period more favorably. This was not to happen.

The plaintiffs had sued both the French government and the national railroad company, the *société nationale des chemins de fer* (SNCF). The French government never appealed the lower court's verdict against it, but the SNCF did appeal, ultimately leading to the French Council of State, the supreme court of administrative law, affirming a reversal that the SNCF won from the Court of Appeals of Bordeaux.<sup>10</sup> The *Lipietz* plaintiffs then applied to a European court, the European Court of Human Rights (ECtHR). Whether or not one considers the ECtHR and the European Court of Justice properly to be called supreme courts, the supranational European courts represent the final legal resort and ultimate appellate recourse. A finding of a violation on the French legal system's part by the ECtHR would have signified the nullification of the French national decision. However, the ECtHR deemed the plaintiffs' application to be inadmissible, so

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6. See Curran, *supra* note 4, at 389.

7. See *Lipietz* Decision, *supra* note 1; Advisory Opinion, *supra* note 2.

8. For an account of how this came about, see generally Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1 (1998).

9. See Curran, *supra* note 4, at 386–88. One of those who had failed before, Kurt Schaechter, is mentioned in the essay of maître Rouquette. See Rémi Rouquette, *The French Administrative Court's Rulings on Compensation Claims Brought by Jewish Survivors of World War II*, 25 MD. J. INT'L L. 304 (2010).

10. For the two appeals, see *Societe Nationale des Chemins de Fer Français c/ MM. Georges Lipietz et A.*, 06BX01570, Cour Administrative d'Appel de Bordeaux [CAA] [Court of Administrative Appeals], Mar. 27, 2007 (Fr.), available at [http://www.haguejusticeportal.net/Docs/NLP/France/Lipietz\\_Appel\\_27-3-2007.pdf](http://www.haguejusticeportal.net/Docs/NLP/France/Lipietz_Appel_27-3-2007.pdf); *Mme L. et autres*, No. 305966, Conseil d'Etat [CE] (High-administrative Court), Dec. 21, 2007 (Fr.), available at <http://www.conseil-etat.fr/cde/node.php?articleid=823>.

the plaintiffs' lower court victory stood against the government but not against the SNCF.<sup>11</sup>

An additional document concerning *Lipietz* follows the Advisory Opinion in these pages: an essay by maître Rémi Rouquette, lawyer for the *Lipietz* plaintiffs.<sup>12</sup> The reader will notice that maître Rouquette alludes to the *Hoffman-Glémane* case.<sup>13</sup> *Hoffman-Glémane* was instituted in the aftermath of the lower court holding in *Lipietz*; the issue the Council of State resolved in that case was whether the statute of limitations had run against the French government. The Court held that it had.<sup>14</sup>

The *Lipietz* case intertwines two important strands of European law. The first is the law's role in dealing with collective memory, an issue that looms in many states from Europe to Africa. In France, attitudes towards the nation's role during the Second World War have evolved politically, socially, historiographically, and legally. A second noteworthy strand of the case, not entirely unrelated to the first, is globalization's effect on national law.

With respect to *Lipietz*, my own previous attention has been concentrated primarily on this second strand,<sup>15</sup> in particular on examining how the lower court decision, unchallenged by the government, marked a transition in French law that showed the effects of foreign, primarily American, tort law influence seeping into French domestic law. Among my theories as to why the Council of State ruled against the plaintiffs in *Lipietz* (and similarly in *Hoffman-Glémane*) is the difficulty a civil law legal order would experience in adapting to a common law importation for which the surrounding legal terrain had not adequately been prepared, as is most likely to occur where, as here, the change is precipitated by a court decision.<sup>16</sup> In such situations, a society can be ill-equipped to handle the

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11. *Lipietz v. France*, E.Ct.H.R., (16 Dec. 2009, No. 49637/09), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=859949&portal=hbkm&source=externalbydocnumber&tabl>

12. See Rouquette, *supra* note 9.

13. *Id.*

14. See *Hoffman-Glémane*, No. 315499, Conseil d'Etat [CE Ass.] (High-Administrative Court), Feb. 16, 2009 (Fr.), *available at* [http://arianeinternet.conseil-etat.fr/arianeinternet/ViewRoot.asp?View=Html&DMode=Html&PushDirectUrl=1&Item=1&fond=DCE&Page=1&querytype=advanced&NbEltPerPage=5&Pluriels=True&dec\\_id\\_t=315499](http://arianeinternet.conseil-etat.fr/arianeinternet/ViewRoot.asp?View=Html&DMode=Html&PushDirectUrl=1&Item=1&fond=DCE&Page=1&querytype=advanced&NbEltPerPage=5&Pluriels=True&dec_id_t=315499).

15. See Curran, *supra* note 4.

16. See *id.* at 398–400.

consequences of the initial change in law.

Indeed, as maître Rouquette states, a vast number of new lawsuits were begun after the *Lipietz* plaintiffs won their case in 2006.<sup>17</sup> They started almost immediately. In a comparable situation in the United States, most of those plaintiffs could have been members of a single class action lawsuit.<sup>18</sup> Since nothing similar to the American class action suit exists in France, the Council of State was able to foresee how the already-taxed judiciary would reel under the burden of thousands of additional cases. Other problems also might be significant. Plaintiffs would not be able to secure legal services on a contingency basis, since contingency fees are impermissible in France, with concomitant financial strain on less prosperous plaintiffs.<sup>19</sup> These difficulties indirectly would have resulted from globalization, inasmuch as *Lipietz* reflected foreign legal influences that caused an Anglo-Saxon style tort case to proceed outside of the criminal law framework, a framework which French law mandates

17. See Rouquette, *supra* note 9. For an interview with two lawyers of post-*Lipietz* plaintiffs, see Jordan Pillet, *La SNCF rattrapée par les trains de la mort*, 9 CULTURE DROIT 16 (Sept.–Oct. 2006).

18. For relevant comparative information in this area, see Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. (forthcoming 2010) (Univ. of Pitt. Legal Studies Research Paper Ser., Working Paper No. 2010-04), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1554472](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554472).

19. The contingency fee system is considered unethical under French law. Known as the *pacte de quota litis*, it is prohibited as against public policy, although a lawyer under some conditions may contract for remuneration based on “result.” See Law No. 71-1130 of December 31, 1971, modified by Decree No. 91-1197 of July 10, 1991, art. 10, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 11, 1991, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068396&dateTexte=20100423>. The French private law supreme court, or *Cour de cassation*, confirmed most recently in January 2010 that the laws permit contingency fee structures only in addition to, not in lieu of, a fixed fee structure. See Deuxième chambre civile [Cass. 2e civ.] [Second Civil Court of Appeal], Jan. 21, 2010, Bulletin des Arrêts, chambres civiles No. 2, Jan. 2010 (Fr.), available at [http://www.avocatparis-bdd.org/GEIDE/File/Cass\\_civ2\\_100121\\_07-10791.htm?Archive=196601391488&File=Cass+Civ+21%2D01%2D2010+n%B007%2D10791+%28htm%29](http://www.avocatparis-bdd.org/GEIDE/File/Cass_civ2_100121_07-10791.htm?Archive=196601391488&File=Cass+Civ+21%2D01%2D2010+n%B007%2D10791+%28htm%29). The absence of a U.S.-style contingency fee basis or class action suit would have posed a severe challenge to the French legal order. In the particular case of plaintiffs similarly situated to *Lipietz et al.*, there appear, however, to have been a group of attorneys, *l'ordre de Cicéron*, prepared to take the work on a pro bono or greatly reduced basis. See Hélène Lipietz, *L’Affaire Lipietz rebondit: Une demande d’avis au Conseil d’Etat audiencée le 6 Février 2009*, at 3–4, Feb. 4, 2009, <http://helene.lipietz.net/spip.php?article182>.

for cases dealing with crimes against humanity.<sup>20</sup>

Law's transnationalization, or the second *Lipietz* strand, is not, however, the focus of the two documents that follow my remarks. The innovative Advisory Opinion by M. Truilhé explains the case and the law in detail, including how the case came to be brought so many years after the relevant events transpired. It covers the history of the French administrative courts, ostensibly through their reasoning on issues of statutes of limitations concerning acts by the Vichy French government. It also suggests what lay at the source of the statutory interpretations, some seemingly paradoxical: how it was, for instance, that the great French legal scholar and opponent of Vichy, René Cassin, laid the groundwork for a case law that had relieved the French governments of the Fourth and Fifth Republics of liability for crimes committed in the name of the French State by the 1940–44 collaborationist government of Pétain.

Those who suffered most during the dark years of Vichy were to learn that there were unsung heroes as well as collaborators and profiteers. Jacqueline Mesnil-Amar, a Jewish woman whose family had been French for many generations, wrote in Paris on July 29, 1944, after the arrest of her beloved husband and from the depth of insight which tragedy can bring, that “real life is choosing” (*la vraie vie, c'est choisir*).<sup>21</sup> M. Truilhé and the Administrative Court of Toulouse, which adopted his opinion as its own in almost all respects, made a choice consistent with great courage and a subtle, generous understanding of French legal history. The evolution from post-war governmental nonliability to liability involved complex issues.

Initially, it had seemed most compelling for the post-war, democratic Fourth Republic to repudiate Vichy as illegal, consistently with the arguments de Gaulle and his legal advisors among the Free French had been making from London to their French compatriots in occupied France, as they urged the latter not to consider their duty or patriotism to consist in loyalty to the so-called *Etat français*, the “French State,” as Pétain dubbed his new regime to

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20. This is a principal theme of my article, *Globalization, Legal Transnationalization and Crimes against Humanity: The Lipietz Case*. See Curran, *supra* note 4. For a recent article on the interface in the French legal system between criminal and civil law, see Véronique Tellier, *En finir avec la primauté du criminel sur le civil!*, 4 REV. DE SCIENCE CRIM. & DR. PÉNAL COMPARÉ 797 (2009).

21. MESNIL-AMAR, *supra* note \*, at 34.

show its rupture with the republican past and, indeed, all that had flowed from the French Revolution. It then seemed logically irreconcilable for the newly reestablished Republic simultaneously to accept continuity for Vichy's most heinous side in the form of legal liability. Thus, as a result of the immediate post-war reaction to assert that the Fourth Republic had no link whatsoever with the collaborationist regime of Vichy, and for an abundance of other reasons as well, victims of Vichy were not able to assert claims successfully against the new French government. As the years went by, the solutions adopted were to prove too simplistic and increasingly ill suited to the times. It was M. Truilhé's advice to the Administrative Court of Toulouse to extend an already-evolving law to its logical conclusion. The court agreed, and the French government did not appeal, so the Advisory Opinion, which traces prior case decisions and legal reasoning in a manner that an official French court decision cannot do, remains a landmark, and its author one whose wide knowledge of his field has nourished it and kept it from desiccating, as Jacqueline Mesnil-Amar cautioned against in the words I quote at the beginning of these remarks.

Maître Rouquette's essay, which ends this trilogy, focuses on historical and legal aspects of the case from his unique perspective as a zealous advocate immersed in the history of his country and in his devotion to a cause. Like Mme Mesnil-Amar, he too is an opponent of the "quiescent conscience." Both maître Rouquette and M. Truilhé will offer the American reader a glimpse into the thinking of French patriots who, as de Gaulle famously wrote of himself, continue to have a certain idea of France.